Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

(2)

No. 98-865

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANR Pipeline Company and
Colorado Interstate Gas Company,
Petitioners,

v.

JOHN D. LAFAVER,
Secretary of the Kansas Department of Revenue, and
MARK S. BECK,
Director of the Division of Property Valuation
of the Kansas Department of Revenue,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM E. WATERS
Division of Property Valuation
Kansas Department of Revenue
Docking State Office Building, 4th Floor
915 S.W. Harrison Street
Topeka, Kansas 66612-1585
Telephone No. (785) 296-4035
Attorney for Respondents

30 pp

QUESTION PRESENTED

Whether the Eleventh Amendment deprives federal courts of jurisdiction over state officers where the relief sought is the retroactive recertification of property values for ad valorem taxation purposes in an action where the state courts have determined such relief is not warranted under either federal or state law?

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. TRADITIONAL *EX PARTE YOUNG* DOCTRINE COMPELS THE DISMISSAL OF PETITIONERS' CLAIMS AGAINST RESPONDENTS	3
II. KANSAS PROVIDES A PLAIN, SPEEDY AND EFFICIENT REMEDY IN STATE TAX MATTERS	5
III. THE DECISION OF THE TENTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANOTHER UNITED STATES COURT OF APPEALS	6
IV. THE TENTH CIRCUIT PROPERLY ANALYZED THE FACTS IN THIS CASE AND CONCLUDED THAT THE *EX PARTE YOUNG* EXCEPTION DOES NOT SAVE THIS LAWSUIT	7
CONCLUSION	9

APPENDIX

COMPLAINT	App. A

TABLE OF AUTHORITIES

CASES

Page

ANR Pipeline Co. v. LaFaver, 150 F.3d 1178 (10th Cir. 1998) ..... passim

Board of Meade County Comm'rs v. State Director of Property Valuation, 18 Kan.App.2d 719, 861 P.2d 1348, *rev. denied*, 253 Kan. 856 (1993) 4

Colorado Interstate Gas Co. v. Beshears, 18 Kan.App.2d 814, 860 P.2d 56 (1993), *rev. denied*, 256 Kan. 994 (1994) 2

Colorado Interstate Gas Co. v. Beshears, No. 77,225, slip op. (Kan. App. Feb. 13, 1998) 2

Doe v. Lawrence Livermore Nat. Laboratory, 131 F.3d 836 (9th Cir. 1997) 6

Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033 (5th Cir.), *reh'g en banc denied*, 146 F.3d 869 (1998), *cert. denied*, No. 98-385, 67 U.S.L.W. 3321 (U.S. Nov. 10, 1998) 6

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Ex parte Young, 209 U.S. 123 (1908) ..... passim

Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952) 7

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) ..... passim

In re Appeal of Colorado Interstate Gas Co., 258 Kan. 310, 903 P.2d 154 (1995) 2, 3

TABLE OF AUTHORITIES (CONTINUED)

Page

In re Tax Appeal of ANR Pipeline, 254 Kan. 534, 866 P.2d 1060, *cert. denied*, 513 U.S 917 (1994) 2

Mille Lacs Band of Chippewa Indians v. Minn., 124 F.3d 904 (8th Cir.), *cert. granted*, 118 S.Ct. 2295 (1998) 7

Mills v. State of Maine, 118 F.3d 37 (1st Cir. 1997) 6

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 5

Northern Natural Gas Company v. Williams, 340 F. Supp. 1126 (D. Kan. 1971), *aff'd*, 405 U.S. 949, *reh'g denied*, 405 U.S. 1048 (1972) 5

Papasan v. Allain, 478 U.S. 265 (1986) 5

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 8

United States v. Johnson, 268 U.S. 220 (1925) 5

No. 98-865

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANR Pipeline Company and
Colorado Interstate Gas Company,
Petitioners,

v.

JOHN D. LAFAVER,
Secretary of the Kansas Department of Revenue, and
MARK S. BECK,
Director of the Division of Property Valuation
of the Kansas Department of Revenue,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit entered on July 21, 1998.

STATEMENT OF THE CASE

The basic facts are stated in the opinion below. Petitioners, however, have omitted or distorted crucial facts that, when revealed, will show that this case is not as presented in the petition.

Petitioners claim they seek only prospective equitable relief against state officers in their official capacity to enjoin on-going violations of federal law. Petition, p. 3. This is not true. Attached as Appendix A is petitioners' complaint[1], which commenced this lawsuit in United States District Court of the District of Kansas on March 14, 1996. Petitioners seek, *inter alia*, (a) relief against two state agencies, the Kansas Department of Revenue and the Division of Property Valuation, App. A-1, A-4; (b) damages in excess of nine million dollars ($9,000,000) plus interest for taxes collected in 1990, 1991, 1992 and 1993, App. A-7, A-12; (c) state recertification of property tax values for tax years 1990, 1991, 1992 and 1993; App. A-5, A-11; and (d) a declaration that respondents violated not only federal law but state constitutional law. App. A-11.

Petitioners state that Kansas does not provide a plain, speedy and efficient remedy is state tax matters. Again, this is not true. Petitioners have had repeated access to Kansas courts. See, *e.g.*, *Colorado Interstate Gas Co. v. Beshears*, 18 Kan.App.2d 814, 860 P.2d 56 (1993), *rev. denied*, 256 Kan. 994 (1994) (petitioners' app. 45a-55a); *In re Appeal of ANR Pipeline*, 254 Kan. 534, 866 P.2d 1060, *cert. denied*, 513 U.S. 917 (1994) (petitioners' app. 56a-74a); *In re Appeal of Colorado Interstate Gas Co.*, 258 Kan. 310, 903 P.2d 154 (1995) (petitioners' app. 75a-86a); and *Colorado Interstate Gas Co. v. Beshears*, No. 77,225, slip op. (Kan. App. Feb. 13, 1998) (petitioners' app. 89a-93a). In addition, petitioners have had administrative hearings (sometimes on stipulated facts) before the State Board of Tax Appeals ("BOTA") involving the subject tax years as well as previous and subsequent tax years. Presently, identical claims involving the 1989 tax year are pending before the Shawnee County District Court. See petitioners' app. 93a. Although the federal district court concluded that these state court remedies were not adequate because petitioners' constitutional claims were terminated without consideration, the Tenth Circuit disagreed stating:

---

[1] Petitioners attached fourteen appendixes to their petition; interestingly, they did not attach the complaint.

> Although the pipelines did not persuade the Kansas courts to give them the relief they sought, they did have the opportunity to raise all their constitutional claims, and in fact they availed themselves of such opportunities. An adequate state remedy only guarantees adequate due process assess to the state courts; it does not guarantee victory to the taxpayer on the merits of the claims asserted.
>
> *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1192-93 (10th Cir. 1998) (petitioners' app. 26a).

Petitioners were not denied access to Kansas courts, nor were they denied the opportunity to present their constitutional claims in Kansas courts. The injury petitioners claim is **not** that their constitutional claims were terminated without consideration, but that their constitutional claims were, in fact, decided by the Kansas Supreme Court. App. A-7. See also Petition, pp. 6-7. Petitioners requested that the Kansas Supreme Court decide the merits of their constitutional issues in order to aid BOTA in the event of a remand[2]. As requested, the Kansas Supreme Court decided petitioners' principal constitutional claims and remanded one of their constitutional claims (whether intangible property is subject to property taxation) to be addressed by BOTA. Petitioners' app. 86a.

REASONS FOR DENYING THE WRIT

I. TRADITIONAL *EX PARTE YOUNG* DOCTRINE COMPELS THE DISMISSAL OF PETITIONERS' CLAIMS AGAINST RESPONDENTS

Petitioners claim that the *Ex parte Young*[3] exception to Eleventh Amendment immunity saves their claims against respondents.

---

[2] Specially, the Kansas Supreme Court stated: "In the event of a remand, appellants ask us to resolve two issues which they claim will expedite further proceeding before BOTA." *In re Appeal of Colorado Interstate Gas Co.*, 258 Kan. at 319, 903 P.2d at 160 (petitioners' app. 86a).

[3] 209 U.S. 123 (1908).

However, traditional *Ex parte Young* doctrine compels the dismissal of petitioners' claims against respondents. In fact, the Tenth Circuit recognized that petitioners' "requested relief runs afoul of some of the long-accepted principles of the *Ex parte Young* doctrine." *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1190 (petitioners' app. 22a).

As previously noted, petitioners seek tax refunds in excess of nine million dollars ($9,000,000) and the recertification of public utility values by state officials for tax years 1990, 1991, 1992 and 1993 contending that such officials have violated federal and state constitutional provisions in the valuation of their property. Petitioners attempt to explain away their claim for tax refunds by asserting that they expect the county defendants, whom they maintain do not have Eleventh Amendment immunity[4], to refund the taxes. This explanation, however, does not explain away petitioners' demand that state officials recertify public utility values. Nor does it explain away the fact that a sizable portion of the taxes collected by the counties ended up in the state treasury. *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1194, n. 17 (petitioners' app. 29a). This Court, in *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), held that the *Ex parte Young* exception will not allow an award of monetary relief that is the practical equivalent of monetary damages. The Tenth Circuit recognized that the recertification of public utility values is the functional equivalent of a money judgment against the state and that it intrudes on the state's special sovereignty interests. *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1194 n. 17 (petitioners'

---

[4] The county defendants may actually have Eleventh Amendment immunity based on the fact that they merely collected the taxes at issue in this case and distributed them to various taxing subdivisions including the state, which levies a sizable tax to fund public schools. See *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1194, n. 17 (petitioners' app. 29a). The county defendants are no more than ministerial agents of the state when it comes to the collection of taxes from state assessed public utilities. See *Board of Meade County Comm'rs v. State Director of Property Valuation*, 18 Kan.App.2d 719, 726, 861 P.2d 1348, 1354, *rev. denied* 253 Kan. 856 (1993) (". . . the statutory schemes dictat[e] no county involvement in the appraisal and assessment of public utility property").

app. 29a, n. 17). In addition, petitioners seek a declaratory judgment that state officials acting in their official capacity violated federal and state law in the past. Complaint, app. A-11. This Court, in *Papasan v. Allain*, 478 U.S. 265, 278 (1986), held that the *Ex parte Young* exception will not allow relief that in essence serves to compensate a party injured in the past by a state official acting in such official's official capacity. Thus, the *Ex parte Young* exception is not applicable here based on the pleaded facts in this case.

II. KANSAS PROVIDES A PLAIN, SPEEDY AND EFFICIENT REMEDY IN STATE TAX MATTERS

As a legal matter, the federal district court determined that Kansas provides a plain, speedy and efficient remedy in state tax matters in *Northern Natural Gas Company v. Williams*, 340 F. Supp. 1126 (D. Kan. 1971), *aff'd*, 405 U.S. 949, *reh'g denied*, 405 U.S. 1048 (1972). Petitioners, however, argue that they were denied a plain, speedy and efficient remedy in fact. *Petition*, pp. 6, 7, 23. Petitioners' appendixes E, F, G, H and I are all Kansas court decisions, which petitioners themselves deem to be relevant to their petition. In not one of these decisions did a Kansas court either deny petitioners access to the court or turn away their constitutional claims without consideration.

The Tenth Circuit concluded that the Kansas courts gave petitioners the opportunity to raise all of their constitutional claims and noted that petitioners, in fact, availed themselves of such opportunities. *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1192 (petitioners' app. 26a). Petitioners, of course, dispute this factual conclusion. This Court, however, does not "grant certiorari to review evidence and discuss specific facts, except in extraordinary circumstances." *United States v. Johnston*, 268 U.S. 220, 227 (1925). See also *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). This case does not present such extraordinary circumstances.

III. THE DECISION OF THE TENTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANOTHER UNITED STATES COURT OF APPEALS

Respondents' research indicates that the Tenth Circuit is the first court that has had occasion to apply this Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) in a tax context. In fact, respondents' research further indicates that this case is the first post-*Coeur d'Alene* case where any special interest of state sovereignty has been implicated.

Petitioners acknowledge that *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997), which did not involve special interests of state sovereignty, is consistent with the Tenth Circuit's decision in this case. Petition at 16. See 118 F.3d at 54, n. 6. However, petitioners assert that the decisions of the 9th Circuit in *Doe v. Lawrence Livermore Nat. Laboratory*, 131 F.3d 836 (9th Cir. 1997) and the 5th Circuit in *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir.), *reh'g en banc denied*, 146 F.3d 869 (1998), *cert. denied*, No. 98-385, 67 U.S.L.W. 3321 (U.S. Nov. 10, 1998) are inconsistent with the Tenth Circuit's decision in this case. Petition at 10, 15. These cases, however, involved very different facts and are simply not comparable. *Doe* was a breach of contract case where a discharged employee sought employment reinstatement. 131 F.3d at 837. The relief sought was strictly prospective and no taxes or special interests of state sovereignty were at issue. The 9th Circuit held that the *Ex parte Young* doctrine survives this Court's treatment of the issue in *Coeur d'Alene* because the employee alleged only an on-going violation of federal law and sought only prospective relief. 131 F.3d at 839. *Doe* is in marked contrast to this case where petitioners' are seeking tax refunds and the recertification of public utility values. In *Earls*, plaintiffs sought to enjoin the state board of certified public accountants from prohibiting the practice of "incompatible professions." 139 F.3d at 1034. The relief sought was strictly prospective and no taxes or special interests of state sovereignty were at issue; therefore, *Earls* is clearly distin-

guishable from this case. Another case cited by petitioners, *Mille Lacs Band of Chippewa Indians v. Minn.*, 124 F.3d 904 (8th Cir.), *cert. granted*, 118 S.Ct. 2295 (1998), likewise does not conflict the Tenth Circuit's decision in this case. In *Mille Lacs*, the 8th Circuit ruled that Minnesota's sovereign immunity was not compromised because only prospective relief (the protection of treaty rights) was sought by plaintiffs.

Finally, petitioners cite *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952), Petition, pp. 18-20, for the proposition that a taxpayer may bring an *Ex parte Young* action against a state official to challenge unlawful taxation. Petition, p. 11. *Redwine* involved a situation where the taxpayer was seeking to enjoin state officials from collecting future taxes in violation of the taxpayer's federal constitutional rights. 342 U.S. at 304. *Redwine*, like all the other cases cited by petitioners, is in marked contrast to this case where petitioners are seeking retroactive relief in the form of tax refunds and the recertification of public utility values.

IV. THE TENTH CIRCUIT PROPERLY ANALYZED THE FACTS IN THIS CASE AND CONCLUDED THAT THE *EX PARTE YOUNG* EXCEPTION DOES NOT SAVE THIS LAWSUIT

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court, in *Coeur d'Alene*, addressed the proper scope and application of the *Ex parte Young* doctrine. Although the continuing validity of the *Ex parte Young* doctrine was not questioned, this Court cautioned that "application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflective reliance on an obvious

fiction." 521 U.S. at 270. Justice Kennedy, writing for the majority, emphasized that *Ex parte Young* must be interpreted consistently with the "real interests served by the Eleventh Amendment." Id. To permit federal court jurisdiction in every case where prospective declarations and injunctive relief is sought against an officer of the state, named in his official capacity, "would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last term in *Seminole* [*Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)], that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction." Id. This Court found that the Idaho's sovereign interest in its lands and waters was a special interest of state sovereignty such that the state had the right to insist on responding to the claims in state court. Id. at 287-88.

This case is similar to *Coeur d'Alene*, except that here, the special interest of state sovereignty is state taxation. Although the Tenth Circuit had no difficulty in determining that state taxation is a special interest of state sovereignty, *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1193-94 (petitioners' app. at 27a-28a), this case really turns on its facts. The Tenth Circuit carefully evaluated the relief sought by petitioners (tax refunds and the recertification of public utility values) and determined that to open the federal courts to such retroactive relief would impermissibly intrude on the special interest a state has in the control of its property tax system. *ANR Pipeline Co. v. LaFaver*, 150 F.3d at 1194 (petitioners' app. at 29a).

For obvious reasons, petitioners prefer to obfuscate the retroactive relief they seek in this case. Instead they focus on hypotheticals. For example, petitioners ask what if a state were to repeal its judicial remedies in tax matters? Petition, p. 12. That situation, however, did not confront the Tenth Circuit[5] and does not con-

---

[5] The Tenth Circuit clearly premised its decision on the fact that petitioners had access to Kansas courts, commenting that petitioners' claims that Kansas courts deprived them of minimal guarantees of procedural due process could be reviewed by this Court through a petition for certiorari. 150 F.3d at 1194 (petitioners' app. at 30a).

front this Court now. When, if ever, such a situation presents itself, the courts can address it and, if warranted, this Court can review the decision on writ of certiorari. In the meantime, hypothetical situations are not a proper ground for granting review on a writ of certiorari.

CONCLUSION

This case is not as presented in the petition. Petitioners are seeking tax refunds and the recertification of public utility values, hardly the prospective relief envisioned by the *Ex parte Young* exception to Eleventh Amendment immunity. The Tenth Circuit carefully evaluated the relief sought by petitioners and determined that to open the federal courts to such retroactive relief would impermissibly intrude on special interests of state sovereignty. The Tenth Circuit decided no important questions of federal law which in any way conflict with applicable decisions of this Court or another United States court of appeals. For these reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

William E. Waters
Division of Property Valuation
Kansas Department of Revenue
Docking State Office Building, 4th Floor
915 S.W. Harrison Street
Topeka, Kansas 66612-1585
Telephone No. (785) 296-4035

Attorney for Respondents

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANR PIPELINE COMPANY and COLORADO INTERSTATE GAS COMPANY, Plaintiffs, vs. JOHN D. LAFAVER, Secretary of the Kansas Department of Revenue, in his official capacity; KANSAS DEPARTMENT OF REVENUE; MARK S. BECK, Director of Division of Property Valuation of the Kansas Department of Revenue, in his official capacity; DIVISION OF PROPERTY VALUATION OF THE KANSAS DEPARTMENT OF REVENUE; AND THEIR RESPECTIVE PREDECESSORS AND SUCCESSORS IN OFFICE; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BROWN; JUDY GRATHWOHL, Brown County Treasurer; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK; COLEEN Z. BROWN, Clark County Treasurer; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE; VELMA BASNETT, Comanche County Treasurer; BOARD OF COUNTY COMMIS-	)	Civil Action No. ____

SIONERS OF THE COUNTY OF DICK-)
INSON; LOUISE HABACKER, Dickinson)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
EDWARDS; MARY I. CARLSON, Edwards)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
FINNEY; RAYLENE NELSON, Finney)
County Treasurer; HUNTER, Ford County)
Treasurer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF GEARY;)
KATHY TREMONT, Geary County Trea-)
surer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF GRANT;)
RITA GEE, Grant County Treasurer;)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF GREELEY; MARY)
DIANE GENTRY, Greeley County Trea-)
surer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF HAMIL-)
TON; CHRIS SQUIRE, Hamilton County)
Treasurer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF HAS-)
KELL; NANCY WEEKS, Haskell County)
Treasurer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF JACK-)
SON; MARILYN K. BROWN, Jackson)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
KEARNY; HOLLY LASHMET, Kearny)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
KIOWA; ELSIE HARALDSON, Kiowa)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
MCPHERSON; BRENDA BECKER, Mc-)

Pherson County Treasurer; BOARD OF)
COUNTY COMMISSIONERS OF THE)
COUNTY OF MEADE; WYNEMA DYE,)
Meade County Treasurer; BOARD OF)
COUNTY COMMISSIONERS OF THE)
COUNTY OF MORTON; LOIS HALL, Mor-)
ton County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
NEMAHA; ROSE M. WILHELM, Nemaha)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
POTTAWATOMIE; LINDA HORGAN,)
Pottawatomie County Treasurer; BOARD OF)
COUNTY COMMISSIONERS OF THE)
COUNTY OF COMMISSIONERS OF THE)
COUNTY OF PRATT; DONNA SHELITE,)
Pratt County Treasurer; BOARD OF)
COUNTY COMMISSIONERS OF THE)
COUNTY OF RENO; LARRY R. TUCKER,)
Reno County Treasurer; BOARD OF)
COUNTY OF THE COUNTY OF RICE;)
LILA BLACKBURN, Rice County Treasurer;)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF RILEY; R. EILEEN)
KING, Riley County Treasurer; BOARD OF)
COUNTY COMMISSIONERS OF THE)
COUNTY OF SALINE; KEITH LILLY, Sa-)
line County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
SEWARD; JO NEESE, Seward County Trea-)
surer; BOARD OF COUNTY COMMIS-)
SIONERS OF THE COUNTY OF STAF-)
FORD; LYNDA L. MCALLISTER, Stafford)
County Treasurer; BOARD OF COUNTY)
COMMISSIONERS OF THE COUNTY OF)
STANTON; PHYLLIS KISTLER, Stanton)

County Treasurer; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF STEVENS; BELVA HICKEY, Stevens County Treasurer; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WABAUNSEE; ELLA MAE KRAUS, Wabaunsee County Treasurer; AND THEIR RESPECTIVE PREDECESSORS AND SUCCESSORS IN OFFICE,

Defendants.

COMPLAINT

Plaintiffs, ANR Pipeline Company and Colorado Interstate Gas Company ("Taxpayers"), file the following Complaint against Defendants.

PARTIES

1. Plaintiff, ANR Pipeline Company, is a Delaware Corporation with its principal place of business in Michigan.

2. Plaintiff, Colorado Interstate Gas Company, is a Delaware corporation with its principal place of business in Colorado.

3. Defendants, John D. LaFaver, Secretary of Revenue of the State of Kansas, in his official capacity; the Department of Revenue of the State of Kansas, an administrative agency of the State of Kansas; Mark S. Beck, Director of the Division of Property Valuation of the Department of Revenue of the State of Kansas, in his official capacity; and The Division of Property Valuation of the Department of Revenue of the State of Kansas ("PVD"); and each of their respective predecessors and successors in office, are the Kansas officials and agency which value and assess Taxpayers' properties for ad valorem tax purposes.

4. Defendants, the Counties, through their respective Boards of County Commissioners, and treasurers listed on the attached Exhibit "A" which is made a part hereof (collectively referred to as "Counties"), are the Counties which tax Taxpayers and to whom Taxpayers paid their ad valorem taxes.

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343 because the controversy asserts deprivation of federal constitutional rights and pursuant to 28 U.S.C. § 1367 for supplemental state law claims.

6. This Court is not barred from asserting jurisdiction by 28 U.S.C. § 1341 (Tax Injunction Act) because for each tax year at issue Taxpayers have been denied a plain, speedy and efficient remedy by agencies and courts in Kansas.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because one or more defendants may be found or reside in this district, a substantial part of the property is situated in this district, and a substantial part of the events or omissions giving rise to the claims herein occurred in this district.

FACTS

8. Taxpayers transport natural gas and other fuels for hire in interstate commerce and are defined as "public utilities" by Kansas law.

9. Railroads also transport fuels for hire in interstate commerce and are defined as "public utilities" by Kansas law.

10. For tax years 1990 through 1993, Taxpayers' properties were valued and assessed by the PVD, and Taxpayers timely paid such taxes to the Counties.

11. For tax years 1990 through 1993, PVD gave railroads an 80% deduction of their personal property resulting in only 20% of railroads' personal property being valued, assessed, and taxed. No such deduction was given to Taxpayers, resulting in 100% of Taxpayers' personal property being valued, assessed, and taxed.

12. For each of the tax years at issue, Taxpayers timely appealed the valuation, assessment, and taxation of their properties to the State Board of Tax Appeals ("BOTA") in accordance with Kansas law, and followed to conclusion all state prescribed procedures.

13. For each of the tax yers [sic] at issue, Taxpayers complained of the systematic, arbitrary and discriminatory assessment, taxation, and wrongful collection and retention of excessive taxes paid. For tax years 1990-91, Taxpayers were ultimately denied relief by the Kansas Supreme Court in *In re Appeal of ANR Pipeline Co.*, 254 Kan. 535, 866 P.2d 1060 (1994). For tax years 1992-93, Taxpayers were ultimately denied relief by the Kansas Supreme Court in *In re Appeal of Colorado Interstate Gas Co.*, 258 Kan. 310, 903 P.2d 154 (1995).

14. For tax years 1990 and 1991, Taxpayers were never afforded a plain, speedy and efficient remedy on their claim that the Kansas Supreme Court must follow the United States Supreme Court decision, *Oregon Revenue Dep't v. ACF Indus.*, 114 S. Ct. 843 (1994), because Taxpayers' case, *In re Appeal of ANR Pipeline Co.*, 254 Kan. 535, 866 P.2d 1060 (1994), was not yet final when the United States Supreme Court decision was rendered.

15. For tax years 1992 and 1993, Taxpayers were never afforded a plain, speedy, and efficient remedy on their claims that their rights had been violated under the Equal Protection Clauses of the United States and Kansas Constitutions and the uniform and equal mandate of the Kansas Constitution.

16. For tax years 1992 and 1993, BOTA dismissed Taxpayers' protests without affording them any opportunity to conduct discovery, present evidence, or otherwise be heard on the nature and merits of their claims.

17. Taxpayers appealed BOTA's denial of due process for tax years 1992 and 1993 to the Kansas Supreme Court, and were again denied fundamental due process rights. In *In re Appeal of Colorado Interstate Gas Co.*, 258 Kan. 310, 903

P.2d 154 (1995), the court acknowledged that Taxpayers had been improperly denied a hearing, but then compounded the denial of Taxpayers' right to due process by issuing a decision on Taxpayers' principal constitutional claims, which were neither framed nor ripe for decision, without affording Taxpayers an opportunity to be heard on those claims, as required by due process.

18. If Taxpayers had been given the same 80% personal property tax deductions as the railroads, Taxpayers' taxes would have been reduced by approximately $4 million for tax years 1990 and 1991, and approximately $5 million for tax years 1992 and 1993.

19. The gross inequities in property tax assessments, the repeated overassessments of taxpayer's property, and the persistent denial of procedural due process, combine to make the Kansas remedies inadequate and demonstrably unfair, and deny Taxpayers a plain, speedy and efficient remedy.

FIRST CLAIM FOR RELIEF
VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

20. Taxpayers incorporate Paragraph 1-19 as though fully set forth.

21. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

22. Defendants' discriminatory conduct is not required by federal law and is not justified by any rationally based legitimate state interest.

23. Defendants have unlawfully collected and retained taxes from Taxpayers in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution causing Taxpayers to suffer damages.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

24. Taxpayers incorporate Paragraphs 1-23 as though fully set forth.

25. The right to just compensation is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law.

26. Defendants have unlawfully collected and retained tax dollars belonging to Taxpayers for the four subject tax years, constituting an unlawful taking of property.

27. Taxpayers are entitled to just compensation for the unlawful taxes collected, interest to compensate for loss of the time value of their money, and any other relief necessary to fully compensate Taxpayers.

28. Additionally, Taxpayers have been denied a plain and adequate remedy and a clear and certain remedy because under Kansas law, Taxpayers are not afforded a right to recover interest on refunds for taxes unlawfully collected and retained.

29. Taxpayers have suffered damages as a result of these actions.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE KANSAS CONSTITUTION

30. Taxpayers incorporate Paragraphs 1-29 as though fully set forth.

31. The Equal Protection Clause of the Kansas Constitution provides in relevant part:

> Equal Rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

32. This Court has supplemental jurisdiction for this state claim pursuant to 28. U.S.C. § 1367 because this claim is so related to the federal claims for which this Court has original jurisdiction that they form a part of the same case or controversy under Article III of the United States Constitution.

33. Defendants have unlawfully collected and retained excessive taxes from Taxpayers in violation of the Equal Protection Clause of the Kansas Constitution causing Taxpayers to suffer damages.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE UNIFORM AND EQUAL MANDATE OF THE KANSAS CONSTITUTION

34. Taxpayers incorporate Paragraphs 1-33 as thought fully set forth.

35. The uniform and equal mandate of the Kansas Constitution provides in relevant part:

> [T]he legislature shall provide for a uniform and equal basis of valuation and rate of taxation for all property subject to taxation.

36. This Court has supplemental jurisdiction for this state claim pursuant to 28 U.S.C. § 1367 because this claim is so related to the federal claims for which this Court has original jurisdiction that they form a part of the same case or controversy under Article III of the United States Constitution.

37. Defendants utilized a basis of valuation for Taxpayers materially different from that utilized for railroads and other commercial property, which violates the uniform and equal mandate of the Kansas Constitution and constitutes constructive fraud as defined by Kansas law.

38. Defendants have collected and retained unlawful taxes from Taxpayers in violation of the uniform and equal

mandate of the Kansas Constitution, and Taxpayers have suffered damages as a result of these actions.

FIFTH CLAIM FOR RELIEF
UNJUST ENRICHMENT/MONEY HAD AND RECEIVED

39. Taxpayers incorporate paragraphs 1-38 as though fully set forth.

40. This Court has supplemental jurisdiction for this state claim pursuant to 28 U.S.C. § 1367 because this claim is so related to the federal claims for which this Court has original jurisdiction that they form a part of the same case or controversy under Article III of the United States Constitution.

41. Defendants have received money from Taxpayers which, in equity and good conscience, they should not retain.

42. Defendants have been unjustly enriched at the expense of Taxpayers and are required to make restitution to Taxpayers for unlawful taxes collected and retained.

SIXTH CLAIM FOR RELIEF
DECLARATORY JUDGMENT

43. Taxpayers incorporate Paragraphs 1-42 as though fully set forth.

44. Despite Taxpayers' continuing and persistent demands that Defendants cease their ongoing discrimination, and that Taxpayers receive equal tax treatment with those similarly situated, Defendants continue their discriminatory and wrongful assessment, taxation, collection and retention of excessive tax payments.

45. There exists an actual controversy between Taxpayers and Defendants within the jurisdiction of this Court and involving the fundamental rights of Taxpayers, which controversy may be determined by a judgment of this Court.

46. Taxpayers request this Court:

A) to determine and adjudicate the rights and liabilities of the parties with respect to ongoing, systematic, arbitrary and discriminatory assessment, taxation, and wrongful collection and retention of excessive taxes paid; and

B) to declare that Defendants have and continue to wrongfully value, assess, tax and retain excessive taxes paid by Taxpayers that are substantially different from those values, assessed, taxed, collected and retained from similarly situated taxpayers, without a rationally based legitimate state interest, in violation of the Equal Protection Clause of the United States Constitution; and

C) to declare that Defendants have and continue to wrongfully value, assess, tax, collect and retain excessive taxes paid by Taxpayers that are substantially different from those valued, assessed, taxed, collected and retained from similarly situated taxpayers in violation of the Equal Protection Clause of the Kansas Constitution; and to declare that Defendants have and continue to utilize a basis of valuation for Taxpayers materially different from that utilized for other taxpayers in violation of the uniform and equal provisions of the Kansas Constitution; and to declare that PVD should recertify to Counties for subject and future tax years lawful values which comply with state and federal constitutions; and

F) to declare that Counties should cease to retain and collect excessive taxes paid by Taxpayers for subject and future tax years.

WHEREFORE, Taxpayers ANR Pipeline Company and Colorado Interstate Gas Company pray for the following relief:

A) Judgment against Counties for damages sustained by Taxpayers in an amount exceeding Nine Million Dollars ($9,000,000) and to be established at trial, including interest since date of payment on all excessive taxes paid;
B) Declaratory judgment against Defendants as specifically requested above in Sixth Claim for Relief;
C) Judgment against all Defendants for costs and attorney fees; and
D) Such other and further relief as the Court deems just and equitable.

TAXPAYERS DEMAND A JURY TRIAL.

DATED: March 14, 1996

/s/ Richard D. Greene, #09031
MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHARTERED
Fourth Floor, 200 W. Douglas
Wichita, Kansas 67202-3084
(316) 262-2671
(316) 262-5991 - Fax
ATTORNEY FOR PLAINTIFFS

EXHIBIT "A" TO COMPLAINT

Board of County Commissioners of Brown County; Judy Grathwohl, in her official capacity as Treasurer of Brown County; and their respective predecessors and successors in office;

Board of County Commissioners of Clark County; Coleen Z. Brown, in her official capacity as Treasurer of Clark County; and their respective predecessors and successors in office;

Board of County Commissioners of Comanche County; Velma Basnett, in her official capacity as Treasurer of Comanche County; and their respective predecessors and successors in office;

Board of County Commissioners of Dickinson County; Louise Habacker, in her official capacity as Treasurer of Dickinson County; and their respective predecessors and successors in office;

Board of County Commissioners of Edwards County; Mary I. Carlson, in her official capacity as Treasurer of Edwards County; and their respective predecessors and successors in office;

Board of County Commissioners of Finney County; Raylene Nelson, in her official capacity as Treasurer of Finney County; and their respective predecessors and successors in office;

Board of County Commissioners of Ford County; Dorothy Hunter, in her official capacity as Treasurer of Ford County; and their respective predecessors and successors in office;

Board of County Commissioners of Geary County; Kathy Tremont, in her official capacity as Treasurer of Geary County; and their respective predecessors and successors in office;

EXHIBIT "A" (CONTINUED)

Board of County Commissioners of Grant County; Rita Gee, in her official capacity as Treasurer of Grant County; and their respective predecessors and successors in office;

Board of County Commissioners of Greeley County; Mary Diane Gentry, in her official capacity as Treasurer of Greeley County; and their respective predecessors and successors in office;

Board of County Commissioners of Hamilton County; Chris Squire, in her official capacity as Treasurer of Hamilton County; and their respective predecessors and successors in office;

Board of County Commissioners of Haskell County; Nancy Weeks, in her official capacity as Treasurer of Haskell County; and their respective predecessors and successors in office;

Board of County Commissioners of Jackson County; Marilyn K. Brown, in her official capacity as Treasurer of Jackson County; and their respective predecessors and successors in office;

Board of County Commissioners of Kearny County; Holly Lashmet, in her official capacity as Treasurer of Kearny County; and their respective predecessors and successors in office;

Board of County Commissioners of Kiowa County; Elsie Haraldson, in her official capacity as Treasurer of Kiowa County; and their respective predecessors and successors in office;

Board of County Commissioners of Meade County; Wynema Dye, in her official capacity as Treasurer of Meade County; and their respective predecessors and successors in office;

EXHIBIT "A" (CONTINUED)

Board of County Commissioners of McPherson County; Brenda Becker, in her official capacity as Treasurer of McPherson County; and their respective predecessors and successors in office;

Board of County Commissioners of Morton County; Lois Hall, in her official capacity as Treasurer of Morton County; and their respective predecessors and successors in office;

Board of County Commissioners of Nemeha County; Rose M. Wilhelm, in her official capacity as Treasurer of Nemaha County; and their respective predecessors and successors in office;

Board of County Commissioners of Pratt County; Donna Shelite, in her official capacity as Treasurer of Pratt County; and their respective predecessors and successors in office;

Board of County Commissioners of Reno County; Larry R. Tucker, in his official capacity as Treasurer of Reno County; and their respective predecessors and successors in office;

Board of County Commissioners of Rice County; Lila Blackburn, in her official capacity as Treasurer of Rice County; and their respective predecessors and successors in office;

Board of County Commissioners of Riley County; R. Eileen King, in her official capacity as Treasurer of Riley County; and their respective predecessors and successors in office;

Board of County Commissioners of Saline County; Keith Lilly, in his official capacity as Treasurer of Saline County; and their respective predecessors and successors in office;

Board of County Commissioners of Seward County; Jo Neese, in her official capacity as Treasurer of Seward County; and their respective predecessors and successors in office;

EXHIBIT "A" (CONTINUED)

Board of County Commissioners of Stafford County; Lynda L. McAllister, in her official capacity as Treasurer of Stafford County; and their respective predecessors and successors in office;

Board of County Commissioners of Stanton County; Phyllis Kistler, in her official capacity as Treasurer of Stanton County; and their respective predecessors and successors in office;

Board of County Commissioners of Stevens County; Belva Hickey, in her official capacity as Treasurer of Stevens County; and their respective predecessors and successors in office;

Board of County Commissioners of Wabaunsee County; Ella Mae Kraus, in her official capacity as Treasurer of Wabaunsee County; and their respective predecessors and successors in office;